IN THE

Supreme Court of the United States.

NO. 190.

OCTOBER TERM, 1903.

WILLIAM S. SELDEN & OTHERS,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA, AND OTHERS, CONSTITUTING THE STATE BOARD OF CANVASSERS OF VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE U. S. FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

This was a suit in equity brought in the Circuit Court of the United States for the Eastern District of Virginia. Upon the filing of the bill, the court below issued a rule against the defendants, requiring them to show cause why an injunction should not be granted the complainants in accordance with the prayer of the bill. The defendants filed an answer to this rule which was in effect a demurrer to the bill, setting forth the grounds upon which the court should decline to award an injunction upon the facts stated in the bill.

Upon hearing the rule, the court was of opinion that upon the allegations of the bill, the complainants were not entitled to any relief, and entered an order dismissing the cause; and from this order, the present appeal has been taken.

The case stated by the bill is that all of the complainants suffered wrong at the hands of the registrars in refusing to put their names upon the registration lists, and that one of the complainants suffered wrong at the hands of the judges of election from their refusal to receive his vote.

The averment as to two of the complainants is, that they applied to register, and were refused registration. As to one of these, it is alleged, that he took no appeal from this refusal of the registrars, "because he did not believe he was bound to appeal, or that he would get justice if he did." As to the other, the averment is, that he "appealed to the judge of the corporation court, and was informed his appeal was filed too late."

The ordinance of registration gave the right of appeal to any applicant who was denied registration, and it is obvious that the averments of the bill present no justification for the omission on the part of these two complainants to take timely steps for redressing any alleged wrong done to them by the registrars.

Neither of these two complainants alleged that they offered to vote at all; their only grievance consists in having been rejected by the registrars, which rejection they made no effort to redress in the manner pointed out by the registration ordinance.

The other complainant, William H. Anderson, avers that when he applied for registration, the registrars admitted him to register by reason of his having served as a soldier, and pretended to place his name on the registration lists after examining his discharge from the United States army, which he exhibited to them; and that he offered to vote on election day, and his vote was rejected because his name had been entered on the registration lists as William *A.* Anderson instead of William *H.* Anderson; that his description in other respects on the registration lists was correct; that he offered to be sworn as to his identity, but the judges of election rejected him; that he tried to find the judge of the corporation court to obtain redress, and found the judge was out of town.

Whether the failure on the part of the registrars to enter the name of this complainant correctly on the registration lists was

intentional or not, it was the duty of Anderson to have examined the lists in due time to ascertain whether or not his name was correctly entered, and have the error corrected by appeal to the courts, as was permitted by the law, for which there was ample time and opportunity under the provisions of the registration ordinance, since the registration was required to be closed on or before October the 15th, 1902, and the election did not take place until November the 4th, 1902.

The judges of election are required by the statute of Virginia to reject the vote of any person applying to vote, unless his name is placed upon the registration books. If the name is not found on the registration books, they have no discretion. If the name is found on the registration books, still the voter may be challenged, and in case of such challenge, the judges of election are required to examine him on oath as to his qualifications, and if he takes the prescribed oath, they are required to receive the vote, unless they be satisfied from evidence adduced before them, or their own knowledge, that he is not a qualified voter.

The provision of the ordinance of registration as to appeal is contained in Section 7, which reads as follows:

> "Section 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county, or to the corporation court of the city, in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register determined, containing a statement of the facts proved before said board, to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon filing of such petition, the clerk of the court shall at once give notice to the commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

The statutes of Virginia, in relation to the casting of votes and challenges to voters, and how the challenge is tried, are contained in Section 125 of the Code of Virginia of 1887, as amended by Act of Assembly of March the 6th, 1890 (Acts of 1889-'90, page 191), and Act of July 28th, 1902 (Acts Extra Session of 1902-'3, page 12), and in Sections 126 and 127 of the Code of 1887. The sections, as amended, read as follows:

"Section 125. *Where ballot-box kept; how ballots received, and names of voters entered on poll-books.*—The ballot-box shall be kept in public view during all elections. The judge to whom any ballot is delivered shall, upon the receipt thereof, pronounce, in an audible voice, the name of the person from whom the ballot is received, and if his name is found on the registration book, and there be no objection made, the said judge shall, without opening the said ballot, or permitting it to be examined (except to ascertain whether it is a single ballot), deposit the same in the ballot-box, whereupon the name of the elector shall be checked on the registration book by one of the judges, and entered by the clerks of election on the poll book, and correctly numbered: provided, that when a registered voter has changed his place of residence from one election district to another in the same county, if he has

a certificate showing that he was duly registered in his former election district in said county, and that his name has, since his removal, been erased from the registration books of said election district, it shall be evidence to entitle him to vote in the district in which he resides, and his name shall be registered on the registration book by the registrar, if he be present, or by one of the judges of election, if he be not present: provided, further, that no person who removes from one city or county to another city or county in this State shall be allowed to vote at any election therein without having first registered upon his transfer at the time and in the modes prescribed in sections seventy-eight and eighty of the Code of eighteen hundred and eighty-seven; and provided, further, that in cities or towns containing over two thousand inhabitants the name of such person shall not be entered by the judge, but only by the registrar, prior to or on the days named in section seventy-eight of the Code."

"Section 126. *Challenges.*—Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."

"Section 127. *How Challenge Tried.*—When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him as to the same; and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear (or affirm) that you are a citizen of the United States, that you are twenty-one years old, that you have resided in this State for twelve months, and in this county, city, or

town for the three months next preceding this election; and that you are not disqualified from voting by the constitution or laws of this State; that your name is (here insert the name given); that in such name you were duly registered as a voter of this election district; that you are now an actual resident of the same; that you are the identical person you represent yourself to be; and that you have not voted in this election, at this or any voting place, so help you God.' If he refuses to take such oath, his vote shall be rejected; if, however, he does take it, his vote shall be received, unless the judges be satisfied, from record or other legal evidence adduced before them, or from their own knowledge, that he is not a qualified voter, in which case they may refuse to permit such person to vote. And they are hereby authorized to administer the necessary oaths or affirmations to all witnesses brought before them to testify as to the qualifications of any person offering to vote. When any person's vote shall be received, after having taken the oath prescribed in this section, it shall be the duty of clerks of election to write on the poll books, at the end of such person's name, the word 'sworn.' "

The Board of State Canvassers, the defendants to the bill, consists of the Governor, Secretary of Commonwealth, Auditor of Public Accounts, Treasurer, and Attorney-General of the Commonwealth of Virginia, who are constituted the board under Section 139 of the Code of Virginia of 1887, which reads as follows:

"Section 139. *Board of State Canvassers.*—The Governor, Secretary of the Commonwealth, Auditor of Public Accounts, State Treasurer, Attorney-General, or any three of them, shall constitute the Board of State Canvassers."

The duties of the board are defined in Section 142 of the Code of Virginia of 1887, which reads as follows:

> "Section 142. *How Election Returns Canvassed by State Board and Certificates of Election Given.*—For the purpose of canvassing the result of elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the fourth Monday in November next after the election, when they shall, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, proceed to examine and make statements of the whole number of votes given at any such election for Attorney-General, members of the Senate and House of Delegates, Representatives in Congress, and electors of President and Vice-President of the United States, or for so many of said officers as have been voted for at such election, which statements shall show the names of persons to whom such votes have been given for either of the said offices, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; they shall certify such statements to be correct, and subscribe their names thereto; and they shall thereupon determine what persons have been by the greatest number of votes duly elected to such offices, or either of them, and shall endorse and subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. The Secretary of the Commonwealth shall record in a suitable book, to be kept by him in his office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and shall, without delay, make out and transmit to each of the

persons thereby declared to be elected (except the Attorney-General, who shall be commissioned by the Governor), a certificate of his election, certified by him under his seal of office. In the election of a Senator, he shall also forward to the clerk of the Senate a certificate of the election of such Senator; and in the case of the election of a member of the House of Delegates, he shall forward to the clerk of the House of Delegates a certificate of the election of such member. And upon the first day of the session of the General Assembly, he shall lay before each house a list of the members elected thereto, with the districts they represent. In cases of special elections to fill vacancies held at any other time than that fixed for general elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the day after the returns of such elections are received, for the purpose of canvassing the result of such special elections in the manner hereinbefore set forth; and if all the abstracts of votes to be counted shall not have been received within the twelve days, the said board shall adjourn, from day to day, until they shall be so received by the Secretary of the Commonwealth."

Sections 139 and 142 were enacted in the year 1870 in substantially the same form in which they now stand in the Code of Virginia. (See Acts of 1869-'70, chapter 76, secs. 45, 48-50.)

The said sections, as well, also, as the provisions of the Code apportioning representation of the State of Virginia in the House of Representatives, and other provisions relating to their election, contained in the statutes of Virginia on that subject (see Code of 1887, secs. 50-53), were enacted by the State of Virginia, in pursuance of the Constitution of the

United States, Article I, Section 4, Clause 1, which reads as follows:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed by each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

Congress has heretofore allowed the States to make regulations on this subject. Shortly after the Federal Constitution was adopted, Virginia, in pursuance of this provision, enacted laws apportioning her representation in the House of Representatives, declaring when and how members of that House should be chosen, and providing for the returns of such elections and declaring the results thereof. (See 12th Hening's Statutes at Large, 653; 13th Hening's Statutes at Large, 331; 1st Tucker's Blackstone, 191.)

These methods have, from time to time, been changed in form, but regulations on the subject have existed continuously in the statute law of Virginia. The statute in relation to the canvassing of the returns and issuing certificates of election to members of the House of Representatives (being Section 142 of the Code, already quoted) has been in force in substantially the same form as it now stands in the Code since its enactment in 1870. This statute is a valid act of the Legislature, passed pursuant to the authority granted by the Federal Constitution, and establishes the only method in existence for ascertaining and certifying the results of elections of members of the House of Representatives in Virginia.

The respondents were elected to their offices under the Constitution and laws of the State of Virginia existing prior to the adoption of the present constitution and registration ordinance, complained of in the bill, and the validity of said Sections 139 and 142 of the Code of Virginia is not denied or questioned by the complainants, nor is the title of the respondents to their offices as *de jure* and *de facto* officers denied.

The acts required by the statute to be done by the State Board of Canvassers could be performed only in their official character as members of the board, and none of the acts could be done by any member of the board alone or individually.

This statement of the facts and the statutes of Virginia is, we believe, sufficient to enable us to state intelligently to the court the grounds upon which the respondents resisted the application for an injunction in this case and our reasons in support of those grounds:

ARGUMENT ON THE POINTS PRESENTED.

I.

The first objection made is, that the case is a suit against the State of Virginia, and prohibited by the 11th amendment of the Federal Constitution. We shall hereafter endeavor to show that the averments of the bill do not set forth any threatened act which could constitute an actionable wrong, if performed, and did not constitute any ground for the intervention of a court of equity in advance of performance, upon various grounds; but, for the purposes of the discussion of the present objection, we will assume that the plaintiffs have set forth a grievance in their bill and would be entitled to an injunction if the State of Virginia had no interest in the matter.

Our contention is, that the suit against the Board of State Canvassers is either a suit against the State of Virginia, or, if not so considered, that the State of Virginia would be an indispensable party to any relief; and this proceeding is barred, because she cannot be brought before the court.

In order to determine whether this be a suit against the State or not, it is necessary to examine carefully what is the nature of the case made and the precise relief sought by the bill.

Let it be assumed that a wrong was done the complainants by the alleged refusal or failure of the registrars to put their names upon the registration books, and by the alleged refusal of the judges of election to allow the complainant, Anderson, to vote; still those wrongs were past, and the present suit was not

brought for the purpose of redressing those wrongs, and no relief granted in this suit could have the effect of redressing those alleged wrongs.

The present suit is not for the purpose of recovering damages for a refusal to register the plaintiffs, nor for a refusal to receive their votes at the election held on November the 4th, 1902. Being a suit in equity, it could not, of course, have that effect. The suit is not brought against the registrars who conducted the registration, nor the judges who conducted the election. It is not brought (if it could be brought at all) for the purpose of compelling the registrars to place the name of the complainants upon the registration lists, nor to compel the judges of election to receive their votes, nor for the purpose of enjoining either of those classes of officers from interfering with or hindering them in the exercise of their alleged right to register and vote. The primary right of the voter is the right to register and vote. When the voter sues in damages for the wrongful deprivation of that right, or brings proceedings to enforce specifically its enjoyment, he does not interfere with the rights and interests of other voters and other members of the body politic of the State. This court has denied that equity has the jurisdiction to enforce by injunction, mandatory or otherwise, the enjoyment of even this right, because it is political in its character; but in this case the complainants are not seeking the enforcement of these distinct rights of each voter, but are asking that the court will declare the entire election held on November the 4th, 1902, to be void, and, upon that ground, restrain the Board of State Canvassers from canvassing the returns from the whole State of Virginia, and from issuing the certificates of election to those persons who received a majority of the votes cast at that election for members of the House of Representatives.

The relief prayed for could not be granted without affecting the rights of others not before the Court. It would restrain the Board of State Canvassers in the performance of duties and functions that are purely political and governmental under a statute of Virginia, passed in pursuance of the Federal Con-

stitution itself—duties and functions devolved upon the board, solely as a public and governmental agency, in the performance of which, not only the Commonwealth of Virginia, but the United States itself is concerned.

If this be a correct statement of the relief prayed, it is plain, we submit, under the decisions of the Supreme Court of the United States, that the case constitutes a suit against the State of Virginia.

In the case of *Cunningham* v. *Railroad Co.*, 109 U. S. 452, this court, in an opinion delivered by Mr. Justice Miller, defined the two classes of cases in which suits against officers of a State can be maintained in the Federal courts without violating the 11th amendment. The first class of cases stated by Mr. Justice Miller are cases where the State officer is sued in an action at law for damages occasioned by an act injurious to the plaintiff, and the officer seeks to justify his action under a State statute which is unconstitutional. This class of cases refers to actions to recover damages for a wrongful act, and must necessarily be in the form of an action at law. The second class of cases defined by Mr. Justice Miller in the case just cited consists of cases in which the Federal courts have been called upon by an injunction, mandatory or prohibitive, to compel or to restrain the doing of some act on the part of a defendant, who is an officer of the State. In defining the cases in which the Federal courts may take jurisdiction under this class of cases, Mr. Justice Miller used the following language, saying that such a suit can be maintained, "where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter *not affecting the general powers or functions of the government*, but in the performance of which one or more individuals have a *distinct interest, capable of enforcement by judicial process.*" (Italics ours.) 109 U. S. 452.

And the court added, that the Federal courts, in entertaining some cases arising under this last class, have gone to the "verge of sound doctrine, if not beyond it, and the principles should be extended no further." 109 U. S. 453.

If the present case be tested by the limits defined in this

carefully guarded language, it is plain that it goes far beyond the bounds fixed by the court in that case. In the first place, the complainants have not a *distinct* interest in the performance of the duties imposed upon the Board of State Canvassers, but an interest intermingled with that of every other member of the body politic in Virginia. All persons who voted at the election held on November the 4th, 1902, have an interest in the action of the Board of State Canvassers, which was sought to be restrained. All persons who failed to vote at that election are presumed in law to have assented to the action of a majority of those voters and are, therefore, interested. The candidates for the House of Representatives voted for have an interest; the Commonwealth of Virginia and the United States each has a profound interest; not a property interest, nor an interest of a pecuniary character, but an interest of the most fundamental and important character in their political capacities. The State of Virginia is entitled to representation in Congress under the Constitution of the United States, and has a direct interest, which will be obstructed and interfered with, and, indeed, temporarily destroyed by any operative or effective injunction against the action of the State Board of Canvassers. For the relief prayed for in the bill could be granted, if at all, only upon the ground that the election held on November the 4th, 1902, was itself void.

Inasmuch as any relief given would necessarily affect this important interest of the Commonwealth of Virginia, she would be an indispensable party to the bill. If the defendants represent her, the suit is forbidden by the 11th amendment of the Federal Constitution. If they do not, the proceeding is barred by the fact that she is an indispensable party, and cannot be brought before the court.

The complainants' alleged rights, then, are not distinct rights, as required by the language of Mr. Justice Miller in 109 U. S., capable of enforcement by judicial process, but are rights which, if capable of enforcement at all by judicial process, are rights which the complainants enjoy only as a part of the body politic,

and in common with all other members of the body politic in Virginia.

When we come, on the other hand, to consider the duties and functions of the defendants constituting the Board of State Canvassers, it will be equally seen that those duties are of a character precisely opposite to that which Mr. Justice Miller lays down as a condition to the jurisdiction of a Federal court when a suit is brought against officers of the State. He says that the suit must be brought to compel the performance of a well-defined duty in regard to a specific matter *"not affecting the general powers or functions of the government."*

In the present case, the duties of the board sought to be restrained are strictly and purely governmental, affecting the entire body politic in its relation to the State and Federal governments. The relief prayed is necessarily against the respondents in their political capacity. It constitutes a suit against the action of the State itself, necessarily affecting the rights and interests of the State, and of the people generally, of which the State itself is the only representative, under principles of public law. The defendants discharge their duties solely as a board, and in the discharge of those duties they have no private interest whatever.

The complainants' interest, whether it be to compel or prevent the canvassing by the defendants of the votes cast at the election held on November the 4th, 1902, is not a private and distinct interest, in which they alone are concerned, but is a common and general interest, which they share with all other members of the body politic, to have the operations and functions of government performed or restrained, as the case may be.

The defendants are an agency of the State of Virginia, established in accordance with the Federal Constitution, for canvassing the returns of members of the House of Representatives. It has been established by this court in the cases of *McCulloch* v. *The State of Maryland*, 4 Wheat., 316; *Collector* v. *Day*, 11 Wallace 113, and in a great number of other cases, that neither the United States, nor the several States, can interfere with or

obstruct the agencies and instrumentalities of the other sovereignty, lawfully established, for the purpose of carrying out its purposes and executing its powers within the sphere of its duties and functions. The act of Congress giving jurisdiction to the Federal courts was never intended to transgress this fundamental rule of the partition of powers between the two governments, and, if so intended, it would have been contrary to the Constitution of the United States.

If an injunction had been granted by the lower court in accordance with the prayer of the bill, it would have afforded no redress to the complainants for the violation of the alleged rights claimed by them, which were the rights to register and vote, but would merely have prevented the Board of State Canvassers from certifying the results of the election and awarding certificates to the members of the House of Representatives elected from Virginia. In other words, it would have controlled the political action of the Board of State Canvassers, as one of the agencies of the government of Virginia, but would not have redressed any right of the complainants capable of judicial cognizance or enforcement by the courts, as a private or distinct right of the plaintiffs; for it will hardly be contended that a voter, because his vote has been refused, can resort to a court of equity to declare the entire election void on that ground.

It is well settled that it is not necessary that the State *eo nomine* should be made a party, in order that the suit may be against her, contrary to the 11th amendment. The suit is equally prohibited if the action is against the officers of the State to control their governmental and political action.

We, therefore, respectfully submit that upon these grounds the present case does not fall within the line of cases in which the Federal courts have taken jurisdiction to compel or restrain a State officer in doing some act which the plaintiff was entitled to have performed or restrained as a matter of individual right, but falls within that class of cases in which the jurisdiction has been declined, because the object of the suit was to control the officers of the State in the discharge of duties relating to the revenue or property, or the political interests and action of the

State. *Louisiana* v. *Jumel,* 107 U. S. 711; *Hagood* v. *Southern,* 117 U. S. 52; *Cunningham* v. *R. R. Co,* 109 U. S. 446; Ex Parte Ayers, 123 U. S. 443, and cases cited in the foregoing cases; and *McCawley* v. *Kellog,* 2 Woods' Circuit Ct. Rep. 13; *Collector* v. *Day,* 11 Wallace, 113. Fitts v. McGhee, 172 U.S. 516, 525, 530.

II.

The defendants in their answer further contended that there was no act of Congress under which the jurisdiction in this case could be supported. See Paragraph 7 of the Answer.

Counsel for the plaintiffs in the lower court, for the purposes of the jurisdiction of the court, relied on Section 629, Clause 12, of the Revised Statutes; Section 629, Clause 16, construed with Section 1979 of the Revised Statutes, and upon the act of 1887, as amended by the act of 1888, governing the general jurisdiction of circuit courts; but we respectfully submit that the jurisdiction cannot be supported under any of these provisions.

Section 629, Clause 12, relates solely to suits to recover damages suffered in consequence of some act done under a statute of the United States, relating to revenue, or to the right of voting, the principle underlying the provision being that every person who sustains damages whilst acting under a law of the United States should have a standing in a Federal court for redress. Opposing counsel construe the provision as giving jurisdiction of suits to enforce the right to vote; but, obviously, this is not the meaning or effect of the act, as may be seen by reference to the statutes on which the clause is founded, cited in the margin of the Revised Statutes. In addition, the act of May 31st, 1870, and February 28th, 1871, as embodied in the United States Revised Statutes, were repealed by act of February the 8th, 1894, 28th U. S. Stats., page 36, chap. 25.

The jurisdiction of the lower court cannot be supported under Section 629, Clause 16, and Section 1979. See *Holt* v. *The Indiana Manufacturing Co.,* 176 U. S., page 68; *Giles* v. *Harris,* 189 U. S. 475.

The lack of any averment of the requisite jurisdictional

amount in the bill prevents this case being supported under the act of Congress of 1887, as amended by the act of May 13th, 1888. We respectfully submit, that Clause 7 of the Answer sufficiently presented this objection to the jurisdiction of the lower court.

Counsel for the plaintiffs in the lower court seemed to rely somewhat, for the purposes of the jurisdiction, on Section 722, United States Revised Statutes. It is plain that this section does not define the extent or scope of the jurisdiction of the Federal courts, but simply adopts forms of procedure prevailing in the States for the purpose of enforcing civil rights. It applies only to civil rights, and it may be doubted whether it embraces proceedings in equity. But, be that as it may, the equity system in Virginia, like that prevailing in the Federal courts, is founded upon the jurisdiction and practice of the equity courts in England, and is subject to the same rules and restrictions as prevail in the Federal courts.

Accordingly, *Giles* v. *Harris*, 189 U. S. 475, and the authorities upon which it is founded, denying jurisdiction of a case like this in equity, are as pertinent upon the subject of the jurisdiction of the equitable forum in Virginia as they are in the United States courts.

III.

The next objection made by the defendants to the maintenance of this case was, that the bill asserts political rights, and seeks to restrain political duties and functions, on the part of the defendants, the State Board of Canvassers, and that a court of equity is without any jurisdiction to entertain the suit or make any order in it.

It needs, we submit, no argument to show that the suit is of the nature above stated, and, that being so, the only question is, whether equity has jurisdiction of such a suit.

It has been held, in a number of cases, that equity has no such jurisdiction. See *Green* v. *Mills*, 69 Fed. Rep. 852, and the cases there cited; *Mississippi* v. *Johnson*, 4 Wall., 475; *Georgia* v. *Stanton*, 6 Wall., 50; *Luther* v. *Borden*, 7 How., 1; In re

Sawyer, 124 U. S., 200; 1 Spelling on Extraordinary Relief, Secs. 630, 631, 692; *Alderson* v. *Comrs.*, 32 W Va., 640; *Fletcher* v. *Tuttle*, 151 Ill., 41, and cases cited; *Hardesty* v. *Taft*, 23 Md., 513; *R. R. Co.* v. *Degraff*, 27 Minn., 1; *Thompson* v. *Ewing*, 1 Brewster, 67; *Dickey* v. *Reed*, 78 Ill., 261; *Lane* v. *Anderson*, 67 Fed. Rep., 563; *Fleming* v. *Guthrie*, 32 W. Va., 1; 2nd Tucker on the Constitution, page 816; *Hughes* v. *Oldham*, 1 Hughes, 76; *Bynum* v. *Comrs.*, 101 N. C., 412; *Smith* v. *Myers*, 109 Ind., 1.

Reference, however, to the above cited cases is unnecessary, for this court has recently considered the question in the case of *Giles* v. *Harris* 189 U. S. 475, and decided that no such jurisdiction is possessed by a court of equity. We respectfully submit that this decision necessarily disposes of this case.

In neither of the cases cited by the appellants from Virginia Court of Appeals was the relief political. In the case of *Blanton, Comr.*, v. *Southern Fertilizer Co., etc.*, 77 Va., 335, the relief prayed was concerning a property right, namely, protection against a pecuniary charge or tax for selling fertilizers; and in *Pearson* v. *Supervisors*, 91 Va. 322, the relief prayed was the protection of tax-payers of a county against unlawful expenditures by the supervisors. In the latter case the Supreme Court of Appeals also held that equity had no jurisdiction in the particular case. It is plain neither of these decisions is opposed to our contention.

IV.

The next ground alleged by the defendants why the bill in this case cannot be maintained is, that the bill prays that the court shall decide that the election held on November the 4th, 1902, is void, and to restrain the Board of State Canvassers from certifying the returns of the said election for members of the House of Representatives.

The Constitution of the United States, Art. 1, Sec. 5, Clause 1, provides—

> "Each house shall be the judge of the elections, returns and qualifications of its own members."

It has been held that this provision makes each house the sole judge upon those subjects. This, we believe, is settled by all the authorities on the subject.

> "It will be sufficient to observe that the whole of the law and custom of Parliament has its original from this one maxim, 'That whatever matter arises concerning either house of Parliament ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere'; hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland. The Commons will not allow the Lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine into the merits of either case." 1st Blackstone's Commentaries, marg. p. 163.
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> "Each house is made the sole judge of the election, return and qualifications of its members. The same power is vested in the British House of Commons, and in the Legislatures of the several States; and there is no other body known to the constitution to which such a power might safely be entrusted." 1st Kent's Commentaries, marg. p. 235.

Justice Story, speaking of the power, says:

> "If lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action, may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and

perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the right and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America." Story on the Constitution, Section 833.

"There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by constitution or statute, other provision is made; it determines its own rules of proceeding; it decides upon the election and qualification of its own members. These powers, it is obviously proper, should rest with the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion." Cooley on Constitutional Limitations, marg. page 133.

In a note Mr. Cooley says:

"The Legislature cannot transfer its power to judge of the election of its members to the courts." Citing for the proposition, *State* v. *Gilman*, 20th Kansas; S. C. 27th Am. Rep. 189.

In delivering the opinion of the court in *People* v. *Hall*, 80 N. Y. 121, Folger, J., said:

"The power seems to have been established in the House of Commons, after a conflict. It was claimed and exercised at one time by the King and Council; at another by the House of Lords, and again by the Chancellor. (See Cox's

> Inst. of Eng. Gov. 117; May's Law of Parliament, 54; Hallam's Const. Hist. Wng., Vol. 1, 273.) In 1624 the Commons declared by resolution that it belonged exclusively to the House itself as an 'ancient, natural and undoubted privilege'; and since then the claim of the House seems to have been acquiesced in on all hands: (Cush. Law and Prac., 54.) The same author says that the power is so essential to the free election and independent existence of a legislative assembly that it may be regarded as a necessary incident to every body of that description which emanates directly from the people; and that the constitutional provisions are out of abundant caution: (Cush. Law and Prac., 54; and see Hammond's Political History, Chapter 3.)"

If an injunction would lie against the Board of State Canvassers to prevent their canvassing said returns and declaring the results of said election for members of the House of Representatives, and issuing certificates of election to the persons elected, the court might equally restrain all the steps in the election of representatives to the Lower House of Congress, and all the election officers, amongst others the registrars, who make up the lists of registration; the judges of election, who receive the votes; the Board of Election Commissioners, who canvass the returns in the several localities in the State, as well as the Board of State Canvassers, who canvass the returns from the entire State.

We believe that it cannot need argument to demonstrate that when the House of Representatives is made the sole judge of the qualification, election and returns of its members, it cannot be within the jurisdiction of any court, practically, to prevent the holding of the election, the casting of the votes and the canvassing of the returns of the election to the House of Representatives, which is a co-ordinate branch of the government.

The exercise of such jurisdiction would impair, and ultimately destroy, the independence of the House of Representatives.

It may be said that the specific relief prayed is an injunction against canvassing the returns and issuing certain certificates of election, and that it would still be competent for the House of Representatives to send for the returns and canvass them, and declare who had been elected.

It would still remain that the court would interfere with and control an agency provided by the Commonwealth of Virginia, pursuant to a provision of the Federal Constitution, for the purpose of ascertaining at least the *prima facie* right of members of the House of Representatives. Even a temporary interference with the membership of the Lower House of Congress might affect the membership and organization of the House.

Cases might be conceived in which, by the concurrent action of several courts, or even by the action of a single judge (if such a jurisdiction was recognized), the political complexion of the House might be changed, at least for a time, and the great difficulties in the way of remedying such an interference which would deprive members of their *prima facie* right are manifest. But the relief prayed in the bill goes much further; for it is based upon the sole ground that the election held on November 4, 1902, was absolutely null and void, and no injunction could be awarded upon the averments of the bill except upon that ground. If the court should make such a decision, its decree would be only in the air. It would not bind the House of Representatives, nor the persons who claim to be elected. The persons claiming to be elected could, notwithstanding the court's decree that the election was void, claim to be seated by the House, and the House of Representatives could actually seat them, and the decree of the court would be futile as to those most directly interested in it. We submit that no court will enter a decree in the air, which cannot bind the persons directly interested, and which the court is without the power of enforcing in an effective way.

The separation of the powers of the government forms the keystone of the republican arch, and is enforced by constitu-

tional provisions in the Constitution of the United States and of the different States, including Virginia. It is inconsistent with the independent existence of the House of Representatives that any court shall have power to interfere with and enjoin officers clothed with the duty of superintending the election or making returns of its members.

If the court would have power to declare such elections void, it would equally have power to compel the returns and even the ballots cast at the election to be brought into the court and actually destroyed; and if that were done, it is plain it would be impossible for the House of Representatives to determine upon the election of any person claiming a seat in that body.

V.

Another ground of defence set up by the defendants was that the complainants do not set forth in their bill any right capable of judicial cognizance or enforceable by any proceeding in court. The only substantive and enforceable right possessed by the plaintiffs, or by any one in like situation, is the right to vote, provided it has been granted under the law of the State, including, of course, the steps enabling that right to be exercised; and the violation of that right may be redressed by appropriate proceedings founded upon such violation against proper parties of whom the court has jurisdiction. But when an election has been concluded, and the returns are to be canvassed and the results of the election declared, it is obvious no single voter, or class of voters, can restrain the issuance of a certificate of election on the ground that the plaintiffs have been denied the privilege of voting under an unconstitutional statute; otherwise, a few voters, or perhaps a single voter, might nullify the results of the election because his right to vote had been improperly refused. In such cases, the only remedy lies in a contest of the election before a proper tribunal established by law for the purpose—in the present case before the House of Representatives—which would have jurisdiction to decide the matter, and could unseat, if it saw fit, the person claiming to

be elected, and seat the rival candidate, or nullify the election and order a new one, as might be proper upon the case made.

No court can enjoin the execution of a State statute simply because it is claimed to be, or is actually, unconstitutional, unless the relief asked in the particular case is based upon a sufficient ground of action appropriate for judicial cognizance and relief against proper parties subject to the jurisdiction of the court. The case stated in the bill in this case merely makes out an abstract or moot case. The bill is evidently brought not for the purpose of redressing the grievance the plaintiffs claim to have suffered (for no relief granted on the bill could have that effect), but in order to obtain the opinion of the court upon the abstract question, whether the Constitution of Virginia is a valid constitution, and whether the suffrage article of that constitution is a valid suffrage article. It has been repeatedly decided by this and other courts that suits will only lie to protect substantive rights by giving damages for their violation, or restraining their violation in the future; but not for the purpose of making a decree in a moot or abstract case. See

Marye v. *Parsons,* 114 U. S., 425;
Mills v. *Green,* 159 U. S., 651, 653;
Sulphur Mines Co. of Va. v. *Bowman,* 94 Va., 480;
Bigelow v. *Hartford Bridge Co.,* 14 Conn., 565;
Bank v. *Fresno Co.,* 52 Cal., 201;
First High on Injunctions, Secs. 7 and 9;
Brem v. *Houck,* 101 N. C., 627.

It is well settled that a bill of injunction is not a remedy for past injuries: High on Injunctions, Sec. 23 and Sec. 355; 144 U. S., 124.

VI.

Another objection to the relief prayed in the bill made in the lower court, was that so far as the complainants state their grievance to be a refusal of the registration officers to register them, it states no actionable wrong, for the reason that the said complainants claim in their bill that the new Constitution of Vir-

ginia and the registration ordinance are void, and if that be so, it plainly follows that any registration of their names under said constitution and ordinance of registration would have been equally void; and that therefore the failure or refusal to put their names on the registration lists could not constitute a legal wrong.

If, on the other hand, the said constitution and registration ordinance are valid in law, then the complainants were plainly bound to avail themselves of the remedy given in the ordinance for any failure or refusal to register them; and in either view, so far as the registration is concerned, they cannot complain, and their grievance in that respect would resolve itself into a case of loss or damage suffered by them without injury, or in consequence of their own default.

And so far as the alleged refusal to permit the complainant, William H. Anderson, to vote is concerned, he fails to show that he was entitled to vote; for in order to vote, it was necessary that he should be actually registered, This was held by this court in the case of *Wiley* v. *Sinkler,* 179 U. S., 58.

VII.

If the complainants were entitled to any remedy, they had a full and adequate remedy by a suit at law against the registration and election officers for damages; and having this remedy at law, they had no right to resort to a court of equity for relief. This remedy, by an action at law, was plainly the direct and appropriate remedy for any wrong suffered by the complainants (if they suffered any at all), and having this remedy, it is a fundamental rule that a court of equity will not entertain them. In addition, upon the same grounds, equity will not entertain such a suit as this, for the reason that the complainants will not suffer irreparable damage if the court should decline to entertain such a suit as the one at bar. Any damages to which they may be entitled could be recovered by them in an appropriate action for damages. Indeed, for the reasons we have already stated, the plaintiffs could not sustain any

damage at all, much less irreparable damage, *in respect to the particular act sought to be enjoined in this case.*

The act of the Board of State Canvassers in issuing certificates of election would not be a legal wrong to the complainants, nor could it cause them any damage in the proper sense of the term; for if any damage resulted, it would be, not to the complainants in their individual character or for any separate amount which they could estimate as their portion of the damage, but to the entire community or body politic. For damages of this nature, suffered by one in common with the rest of the public, it is well settled there is no private right of action, unless the complainant shows a peculiar and special damage to himself.

VIII.

If the court should be of opinion that the foregoing objections are unfounded, and that the court is at liberty to consider the merits of the bill, we respectfully submit that it is equally unfounded on the merits of the case attempted to be made by it.

On the merits the bill alleges four distinct grounds upon which the complainants claim the existing Constitution of Virginia and the ordinance of registration attached to and adopted with it to be unconstitutional and void:

First. Because by the act of Congress of January 26, 1870, they claim that there was established a permanent and continuing limitation upon the power of the State to restrict suffrage to any extent beyond the limitations contained in the former Constitution of Virginia adopted in 1869.

Secondly. Because the convention which adopted the existing constitution had no power to proclaim the constitution, but only had power to submit it for approval and ratification by the people.

Thirdly. That said constitution was void and of no effect, because the members of the convention who adopted the same did not take any oath as required by the former Constitution of Virginia; and

Fourthly. Because the complainants claim that the suffrage article of the present Constitution of Virginia is void, because by it the right of citizens of the United States to vote is denied or abridged on account of race, color or previous condition of servitude, contrary to the 15th amendment of the Federal Constitution.

We respectfully submit that none of these grounds of objection to the said constitution and ordinance of registration is sound.

Considering these objections in their order, we submit—

(a) Congress had no power to limit the right of the State of Virginia to regulate suffrage in accordance with the changing conditions and requirements of the people of the State. The said restriction was attempted to be imposed as a part of the reconstruction legislation of Congress following the late war between the sections. Various efforts were made on the part of the Southern States to bring the constitutionality of that legislation before the Supreme Court of the United States, none of which were successful, and consequently the validity of that legislation has never been directly passed upon. These efforts were made in the cases of *Mississippi* v. *Johnson,* 4 Wallace, 475; *Georgia* v. *Stanton,* 6 Wallace, 50, and in McArdle's Case, 6 Wallace, 318; S. C., 7 Wallace, 506. But while this court has never passed upon this legislation, we submit there is no doubt in the professional mind of the country as to what would have been the result of the matter if this court had been allowed to pass upon it.

That it is not within the constitutional power of Congress to make such a limitation upon the power of the State springs from the nature of the so-called "right" of suffrage and the control which all the States have over that subject. The so-called right of suffrage is not a natural or civil right, but is a political privilege which must be derived from the State itself. The only limitation upon the power of the State over the matter of suffrage arises from the provision of the Constitution of the United States that the right shall not be abridged nor denied by a State on account of race, color or previous condition

of servitude. The sole rights in this respect derived from the Federal Constitution are the right to be exempt from discrimination on account of race or color, and the right of citizens who are qualified as voters for the most numerous branch of the State legislature to vote for members of the House of Representatives.

United States v. *Reese,* 92 U. S., 215;
United States v. *Cruikshank,,* 92 U. S., 542;
Minor v. *Happersett,* 21 Wallace, 162;
United States v. *Harris,* 106 U. S., 637;
United States v. *Miller,* 107 Fed. Rep., 915;
Lackie v. *United States,* 107 Fed. Rep., 114, 118.

The State, therefore, has the right to determine for itself from time to time, provided it does not discriminate on account of race or color, what persons, or classes of persons, possess the intelligence, virtue and interest in the community entitling them to exercise the privilege of voting. The existence of this right to regulate suffrage and to change its qualifications from time to time, in accordance with the needs and exigencies of society, is one of the most important that can belong to a free people. Its existence is as important to the welfare of those who may be deemed unfit for the exercise of the privilege of voting as it is for the welfare of those who are entrusted with it. Under our system, it is impossible to conceive of a free and republican State deprived of this important right of restricting or extending the privilege of suffrage at its pleasure according to the changing needs of the community.

The Supreme Court of the United States has repeatedly held that while the effect of the late war was to establish hostile governments in the States which undertook to secede, the States themselves were never beyond the pale of the Union; that the States had no right to secede, and that the Southern States remained in the Union subject to the duties and clothed with the powers contemplated by the Federal Constitution, and entitled to all the rights assured by that constitution or reserved to the States or the people.

It cannot be necessary to quote from the numerous cases decided by this court to that effect. A reference to them is all that is deemed necessary in support of these contentions. See

Texas v. *White*, 7 Wallace, 700;
White v. *Hart*, 13 Wallace, 646;
Virginia v. *West Virginia*, 11 Wallace, 39;
Thorington v. *Smith*, 8 Wallace, 1, 9;
Wliliams v. *Bruffy*, 96 U. S., 176, 192;
Keith v. *Clark*, 97 U. S., 454, 465.

The power of Congress to pass the reconstruction measures, including the act of Congress of January 26, 1870, must be derived from the provision of the constitution that the United States shall guarantee to every State in this Union a republican form of government. (Art. IV., Sec. 4.) In executing this provision, Congress had the power, of course, to adopt such measures as were necessary and appropriate to secure that result, and if any particular provision is valid, it must be because it is necessary and appropriate as guaranteeing or insuring a republican form of government. It, therefore, gave Congress the power to compel the State to adopt or establish republican forms of government in order that they might participate in their privileges under the Federal Constitution, but it did not give to Congress a power of original legislation, or of establishing fundamental provisions of government in the various States. It is obvious that there may be a republican form of government without universal or unlimited suffrage; and it is still more obvious that it is inconsistent with a republican form of government, or with any form of a well-ordered government, that there should be an unalterable or unchangeable suffrage, no matter how much restrictions may be required by the conditions of the community. The power of the people to alter or restrict the suffrage according to their changing conditions and needs, so far from being inconsistent with a republican form of government, is, we respectfully submit, a necessary feature of a republican or free government. It must, therefore, be plain that it was beyond the power of Congress to affix a limitation or condition to the

admission of the State of Virginia which, so far from guaranteeing a republican form of government, necessarily impugned and took away the fundamental and sovereign power which has been universally deemed an essential right in every free government from the time of, and before, the establishment of the Federal Constitution itself.

When the people of Virginia adopted the constitution of 1869 and elected their State officers under it, it is plain they had organized a republican form of government in accordance with the requirements of the Federal Constitution; and the obligations of Virginia, the principal obligor to that constitution, having been performed, there remained nothing for the United States, the guarantor, to do except to admit the representatives of Virginia to representation in the Congress. The right of representation in Congress under the Federal Constitution belonged to Virginia as much as to the other States in the Union. That constitution established a union of equal States, and no discrimination or restriction against her sovereign rights can be imposed by any power. The Supreme Court has denied the right to impose restrictions limiting the sovereign rights of a State upon the admission of such State into the Union, and much less can such limitations be imposed upon States already in the Union. See the cases already cited; also *Williamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 89, and cases cited.

It is alleged in the bill that the State of Virginia accepted this restriction, but this is incorrect. But even if such acceptance had been made, it would not have been binding upon the State, for it is a fundamental principle that the right to regulate suffrage from time to time as may be needed and required, is a fundamental and sovereign right which is inalienable, and cannot be parted with by any people so as to bind future generations.

We, therefore, submit that this restriction upon the sovereign rights of the State as a condition to the enjoyment of its constitutional right to representation in Congress was not binding upon Virginia either in law or in morals, and that Virginia

has the right to regulate suffrage within its borders as the changing conditions of society may from time to time require, to the same extent and in the same manner as that right is enjoyed by the States of Massachusetts and New York and other States belonging to the section which prevailed in the late war.

(b) We next submit that the existing Constitution of Virginia, and the schedule and ordinance attached thereto and made a part thereof, were validly adopted by the Constitutional Convention, and that the same became operative and effective for all purposes on July 10, 1902, in accordance with the mandate of said convention. The right of the convention to ordain the constitution without submission for ratification to the vote of the people is, we submit, beyond serious question. Mr. John Randolph Tucker, in his work on the constitution (at page 69), says:

> "When the convention frames a constitution, as that is its only charge, it is *functus officio*. Whether its consummated work shall be submitted to a vote of the people, and if so, what shall be the basis of suffrage, and what vote shall be necessary to give it final effect, are questions as to which there has been no settled canon in our political science and no uniformity of custom.
>
> "It may be stated, however, as a fact, that all the constitutions of the original States were ordained by convention, without a submission of the constitution so framed to a popular vote for ratification. The deliberative act of the representatives elected by the body politic was thought to have the sanction of the latter without a subsequent vote. And this was unquestionably the general view of all the States when, in the Federal Convention which composed the constitution in 1787, their consummate act was submitted for ratification to each State through its separate convention, without any subsequent sanc-

tion by the popular vote of its people. The amendments to the Constitution of the United States are to be adopted by the legislatures or conventions of the several States, without the necessity of submission to a popular vote.

"During the last half century or more it has been the usual practice for the convention to frame the constitution and then submit it to a popular vote for final ratification; but this practice has had exceptions, and it may be safely stated that the validity of a constitution will not be held to depend upon its final ratification by popular vote.

"The practice in Virginia may be mentioned as an example.

"The first constitution of Virginia, drawn by George Mason, was adopted in convention of the State on the 29th day of June, 1776, which was not ratified by popular vote. It was judicially held to be valid in *Kamper* v. *Hawkins,* 1 Va. Cases, 20, and continued in full operation until the constitution of 1830 was adopted. In that year a convention was called by legislative act to amend the constitution, and it decided to submit the constitution it proposed to the voters entitled to suffrage under the proposed constitution, which greatly enlarged suffrage beyond what had been allowed under the constitution of 1776. It was ratified by that popular vote. The constitution of 1850 was adopted in convention and submitted to a popular vote for ratification. The constitution of 1870 was adopted in convention and ratified by popular vote, but, by its twelfth article, amendments thereto may be proposed in the Senate and House of Delegates, and if agreed to by the majority of the General Assembly next chosen, shall then be submitted

to the people for ratification, and upon such ratification shall become a part of the constitution.

"The practice in other States need not be especially adverted to, except that recently the State of Mississippi adopted a constitution in convention, which was established by the act of the convention without a submission of it to the vote of the people. Whether such a constitution so established shall be held to be the constitution of the State, without the ratification by popular vote, has been questioned. All doubt of its validity would seem to be settled by the fact that the Constitution of the United States is held to be binding upon each of the States of the Union, though it was ratified by a convention of the people of each State, and not by any submission to popular vote. If, therefore, a constitution of a State should be held invalid because not ratified by popular vote, it would raise a doubt as to the validity of the Constitution of the United States, which was ratified by conventions without submission to a popular vote."

See also 1st Tucker on Constitutional Law, Sec. 58, pp. 72, 73; *Sproule* v. *Mississippi,* 69 Miss., 898; *State* v. *Neal,* 42 Mo., 119.

The constitutional conventions of Virginia of 1830 and 1850 in effect ordained their suffrage articles, submitting the residue of the constitution in each case to the enlarged class of voters enfranchised by the constitution.

The 12th section of the previous constitution of Virginia, adopted in 1869, provides for the amendment of the constitution. The first section, article 12, provides for amendment to be effected through the instrumentality of two succeeding legislatures, and provides that all amendments agreed to by a majority of the members of both Houses chosen at two successive elections may be proposed to the people, and if ratified by them,

shall become a part of the constitution. The second section of article 12 is in strong contrast with the section just referred to. It provides for the amendment of the constitution by a constitutional convention, and entirely omits any requirement that the action of the convention shall be submitted to ratification by popular vote, and the plain effect of the language used confers absolute power upon the convention to ordain the constitution adopted by it.

Opposing counsel rely upon the act of the legislature approved February 16, 1901, one of the provisions of which requires the constitution to be submitted to ratification by the people; but this provision, if it could have been constitutionally adopted at any time, was plainly too late, and was an unconstitutional limitation upon the powers of the convention. This will readily be seen by an examination of the second section of article 12, and by the acts of the legislature passed to carry that section into operation.

The second section of Art. XII. of the Constitution of Virginia, of 1869, reads as follows:

> "Sec. 2. At the general election to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention: provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this Constitution, except for causes which apply to all persons and classes without distinction."

Pursuant to this provision, the Legislature of Virginia, by an act approved March 5, 1900, submitted the said question, "Shall there be a convention to revise the constitution and amend the same?" to the vote of the people.

An election was held under that submission and resulted in favor of holding the convention. This provision of the constitution, this act of Assembly, submitting the prescribed question to the voters, and the affirmative vote of the people in favor of the convention, definitively fixed its status and powers. In other words, the people ordained that there should be a convention empowered "to revise the constitution and amend the same." It is manifest that this matter having been so decided, there was no power in the legislature to restrict or impair the powers of the convention so ordered by the people. The constitution itself definitely provided what further action the legislature should take. The constitution declared: "In case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention."

Under the provision of the constitution, therefore, the legislature was restricted to providing for the election of the delegates to the convention already ordered by the people, and certainly had no power at that stage (if the legislature would have had constitutional power at an earlier stage to have done so) to limit the powers of the convention, but could only provide for the election of delegates to it.

Pursuant to the provision of the constitution, the legislature did, by the act approved February 16, 1901, make provision for the election of the members of the convention, and in addition went on to provide that the constitution when adopted by the convention should be submitted to ratification by the people.

To the extent that the act of February 16, 1901, provided for the election of delegates, it was pursuant to the constitution, and was valid. But the attempt to restrict the powers of the convention and to require any instrument adopted by

them to be submitted for ratification to the vote of the people was extra-constitutional, in derogation of the powers of the convention representing the people, and beyond the legislative power.

In addition to this, the question whether the existing constitution of Virginia was validly adopted and constitutes the true Constitution of the State is one which the Federal courts have no power to decide. It has been held that where there are two State governments in existence, each claiming to be the real government, it rests with the executive and legislative departments of the Federal government, and not the judiciary, to decide which is the true government of the State, and that the question is a political one of which the courts cannot take cognizance. See

Luther v. *Borden*, 7 How., 1;
Keith v. *Clark*, 97 U. S., 474;
Texas v. *White*, 7 Wall., 700.

In addition to this, the bill alleged that the existing constitution of Virginia had been recognized by the executive, legislative and judicial officers of the State. At the time the bill was filed the General Assembly of Virginia was in session, and had passed acts under and in pursuance to the said new constitution, and had recognized the said constitution, and these acts had been approved by the Governor of the Commonwealth. Both Houses of the General Assembly had passed a joint resolution in the following words:

"Resolved by the Senate (the House of Delegates concurring), That the Constitution of the State of Virginia ordained by the convention which assembled in the city of Richmond on the twelfth day of June, nineteen hundred and one, be, and the same is, hereby recognized by the General Assembly as the Constitution of Virginia; and

"Resolved further, That the members of each House of said General Assembly do now proceed to take and subscribe the oath or affirmation ordained by the said convention."

And the said constitution was in actual, peaceful operation, recognized by all departments of State government.

Accordingly, if there could be any serious doubt about the original power to ordain the constitution of 1902, and even if the question could be passed upon by the Federal Courts when there is no conflict and only one government in the State; still since the bill in the present case alleged that the constitution and schedule and ordinance had been recognized by every department of the State government, it is clear its constitutionality and validity could not be questioned or denied in the United States courts. See

Miller v. *Johnson*, 15 L. R. A., 524;
Woods' Appeal, 75 Pa. St., 59;
Luther v. *Borden*, 7 Howard, 1;
Virginia v. *West Virginia*, 11 Wallace, 39;
In re Sawyer, 124 U. S., 200;
In re Duncan, 139 U. S., 449;
Taylor & Marshall v. *Beckham*, 178 U. S., 548.

In the case of *Taylor* v. *Commonwealth*, decided by the Supreme Court of Appeals of Virginia at its Wytheville term, 1903, and reported Va. Law Reg., Sept., 1903, p. 381, it was held that the constitution of 1902 is the valid and existing constitution of the State of Virginia. We respectfully submit, that after this decision of the Supreme Court of Virginia as to what constitutes the true constitution of the State, it would not be competent for any other court to question the manner in which said constitution had been adopted.

See the cases cited *supra*.

(c) We submit, in the next place, that the objection made in the bill that the members of the convention did not take an oath, and therefore the constitution is invalid, is wholly without foundation.

This contention, we submit, is fully answered by what we have said under the foregoing head.

In addition, it is well settled, that even if officers are required

to take an oath, their acts under color of office are valid, although they may have failed to take the oath. See

Throop on Public Officers, Sec. 630, and cases cited;

Mechem on Public Officers, Secs. 329, 330 and cases cited.

THE SUFFRAGE ARTICLE.

(d) We come now to consider the most important of the grounds relied upon by the appellants in the attack they seek to make upon the present Constitution of Virginia, namely, that Article II., the suffrage article, is invalid because in violation of the fifteenth amendment to the Federal Constitution.

This is the basic contention upon which the acrimonious assault attempted to be made by the appellants rests.

We have so far forborne to consider this feature of the appellants' extravagant arraignment of the constitution and the convention which framed it, not because the charges they make have any foundation either in fact or in law, but because they have failed to present a case in which the question they discuss can be properly adjudicated by this or any other court. We did not care to debate an abstract proposition.

The question thus presented is, however, of such interest, and far-reaching importance, that we beg leave to reply to the criticism to which the appellants have subjected this feature of the Virginia suffrage article.

Their contention is that Article II. of the Virginia Constitution deprives the complainants and other negro citizens of Virginia of the right to vote, "on account of their race or color."

The defendants, and the Commonwealth, whose officers they are, are fully prepared to meet and refute any such charge whenever it shall be presented in a case in which its decision is necessary to the proper adjudication of the cause.

If this was such a case, or if ever such a suit is instituted in

any court having jurisdiction of the subject and of the parties, it can be abundantly shown, and doubtless will be demonstrated, that the charge is fallacious both as a statement of fact and as a proposition of law.

The decision of any such case must be controlled by the following irrefutable postulates:

1. The States of the Federal Union, and the States alone, are vested with plenary power and discretion to determine who shall be clothed with the duty, the privilege and the right of suffrage, subject only to the condition prescribed in the fifteenth amendment to the Constitution of the United States that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude.

2. Any qualification for the exercise of the duty, privilege and right of voting which does not deny or abridge that right because of the race, color or previous condition of servitude of the citizen may be prescribed by the State.

3. Those citizens of a State who, by its laws framed in conformity with the limitations of the fifteenth amendment, are made to constitute the electorate who shall choose the members of the most numerous branch of the legislature of such State, are made Federal electors, by Clause 1 of Section 2 of Article I. of the Federal Constitution and assured the right to vote for members of the House of Representatives.

4. While any such Federal elector will have a cause of action against any election officers of the State who shall wrongfully deny him the exercise of his right to vote at any Federal election, such right to vote at any such election, though founded in and assured by the Federal Constitution, is primarily derived from the State and does not exist when the State has withheld the grant of such right for any cause or upon any ground, other than the race, color or previous condition of servitude of the citizen.

5. Subject to the limitation of the fifteenth amendment, the

States have entire control of the subject of suffrage within their respective jurisdictions, and may prescribe the qualifications for its enjoyment, and have the exclusive right to decide as to the reasonableness, the justice, and the wisdom of those qualifications. Massachusetts, New York, and Virginia may each, for itself, determine who shall constitute its electorate, without let or hindrance from the other States or the general government, provided only that there must be no denial or abridgement of the right to vote "on account of race, color or previous condition of servitude."

6. In determining what the qualifications of a voter shall be, it is competent for the State to fix, as tests of fitness, characteristics which, though possessed by both white and colored citizens, are possessed by the whites in larger proportion than the blacks; for instance, the qualifications of intelligence, military service in time of war, the ownership of property, or any other qualities or attributes which are not based on the race, color or previous condition of servitude of the citizen.

These propositions are established by the following decisions:

United States v. *Reece*, 92 U. S., 215;
United States v. *Cruikshank*, 92 U. S., 542;
Minor v. *Happersett*, 21 Wall., 162;
United States v. *Harris*, 106 U. S., 637;
United States v. *Miller*, 107 Fed. Rep., 915;
Lackie v. *United States*, 107 Fed. Rep., 114, and
Williams v. *Mississippi*, 170 U. S., 213.

A careful scrutiny of the provisions of the Virginia suffrage article will show that none of its provisions are repugnant to these cardinal rules of constitutional validity.

The qualifications prescribed for voters by that article of the Virginia Constitution are as follows:

I. The requisites as to citizenship, residence, &c., are prescribed in Section 18 of the Virginia Constitution, which is in the following language:

Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

These requirements as to citizenship, sex, age, residence, &c., are universal, and apply to all races and colors alike.

II. For the voters to be enrolled upon the general registrations required to be made in 1902 and 1903 the requisite qualifications are set forth as follows:

Sec. 19. There shall be general registrations in the counties, cities and towns of the State during the years nineteen hundred and two and nineteen hundred and three, at such times and in such manner as may be prescribed by an ordinance of this convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in section eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this constitution, served in time of war in the army or navy of the United States, of the Con-

federate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person who owns property, upon which, for the year next preceding that in which he offers to register, State taxes aggregating at least one dollar have been paid; or,

Fourth. A person able to read any section of this constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed for record and preservation, in the clerk's office of the Circuit Court of the county, or the clerk's office of the Corporation Court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section twenty-three. Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county or the Corporation Court of his city, or the judge thereof in vacation.

(1) The first and second of these qualifications—military services rendered his state or country, as a soldier in time of war, prior to the adoption of the constitution, or that he is a son of any such soldier—will be briefly considered together.

Each of these provisions applies alike, though in different proportions, to the white and colored citizens of the State.

There were 151,337 negro soldiers enlisted in the United States army during the Civil War. (See Vol. 2, Historical Register and Dictionary of the United States Army, page 285.) The records of that army to which we have had access do not show how many of these were from Virginia, but, as Virginia, by the census of 1860, had more than twelve per cent. of the negro population of the country, and as large portions of her territory were within or near the lines of the Federal armies during the Civil War, and thousands of her colored population during that period left her borders and went to Washington and to other points permanently held by the military forces of the United States, it is fair to estimate that at least one-eighth of these colored soldiers were from Virginia.

The total colored population in 1860 was 4,441,830. (12th Census U. S., Vol. I., p. 115.)

Virginia's colored population in 1860 was 548,907. (Compendium 12th Census, p. 12.)

There were also a number of colored soldiers from Virginia in the service of the National Government during the Spanish-American war.

All of these who survive, and their sons, were entitled, if possessing the qualifications of residences prescribed in section eighteen, to be registered and to vote.

It will be observed also that this qualification is not limited to soldiers who enlisted from Virginia, or their sons. It embraces all of the survivors of the 152,000 colored soldiers of the Civil War, and all of those of the Spanish-American War, and all of their sons, who have lived in Virginia for the requisite period.

There is accordingly no racial discrimination in these provisions. They automatically admit to the right of suffrage thousands of colored men and thousands of white men. It is true that they admit many more of the whites than of the colored race; but this is because many more white than colored men have either been soldiers in time of war, or are the sons of such soldiers.

There can be no objection, upon any account, to allowing all men who have served their people in time of war to have a voice in the government of the State. Those who have risked their lives in the service of their country have the strongest claims to such recognition.

(2) Whatever may be said as to the justice or expediency of such a provision, there can be no objection based upon the language of the fifteenth amendment, or upon any other clause of the Federal Constitution, to admitting the sons of veterans to the right to vote.

It applies alike to the sons of colored and to the sons of white soldiers, and that is a sufficient answer to the charge that it is in contravention of the Federal Constitution.

These classes of citizens are not admitted to suffrage because they or their fathers were white soldiers, or were colored soldiers, but because they were soldiers who have imperiled their lives in the service of their people, or are the sons of such soldiers.

The expediency, the wisdom or the justice of the clause extending the right of suffrage to the sons of soldiers is not a question for this court, or for any court. As to that, within the limits already stated, the power of the State is supreme; but it cannot be amiss to point out here that this provision was not based upon any consideration of favoritism. Nor was it a capricious or an arbitrary exercise of power.

As a rule, as a matter of just consideration for the patriotic and self-sacrificing services rendered and the heroic qualities exhibited by the soldiers of our country, upon both sides, in the Civil War, and upon our country's side in every contest in which we have been involved with other nations, it was considered that it would be wrong to deny the right of suffrage to the sons of these gallant men.

There was another consideration which goes far to justify this clause in the Virginia suffrage plan. The Virginians who survived the Civil War were generally too poor to give their children the benefits of education. There was then no system

of public education at all, and for a number of years afterwards no adequate public school system in the State.

Without any fault of theirs or of their parents, many of the sons of these veterans, of both races, had had no opportunity whatever to obtain the education necessary to enable them to comply with the otherwise reasonable and just educational qualification which the Convention prescribed as a requisite to the right to register and vote. Many of these young men were sons of veterans who had fallen in battle or lost their lives by disease during that war, or had survived it with maimed bodies; or, if without disabling wounds, without education and without fortune, to confront the ordeal of a desperate struggle for subsistence for the wives and children who, in the midst of a desolate land, fondly awaited their return to their humble homes.

It was believed to be right not to deny suffrage to the sons of such men.

Whether the Constitutional Convention did or did not err in this, its action in this regard was clearly not in contravention of the fifteenth amendment or of any limitation of the Federal Constitution, and cannot be brought in question in this court.

The next clause in the Virginia suffrage article is one which vests the right to vote in,

(3). Every male citizen having the requisite qualifications as to age and residence, &c., who is the owner of property upon which State taxes aggregating at least one dollar were paid in 1901 or in 1902.

This is a small property qualification, applying alike to white and colored citizens, though necessarily in variant proportions.

The State tax rate in 1901 and 1902 was forty cents upon the one hundred dollars of assessed values; so that the effect of this clause was to vest all male citizens, without regard to their color, with the right to register and vote, provided they owned property of any kind of the aggregate value of not less than two hundred and fifty dollars, on which the State taxes were paid for the year 1901 or for the year 1902.

Under this provision many thousand were given the right of suffrage. By far the greater number of these were whites; but

there were, as the public records of the State show, thousands of negroes who owned property of the requisite value to entitle them to register and vote under this requirement.

At all events, there was in it no discrimination on account of color or race..

The voters whom it enfranchised were admitted to suffrage not because they were whites or because they were negroes, but because they had such a stake in the community, or, in the language of the immortal Bill of Rights of Virginia, because they afforded "sufficient evidence of permanent common interest with and attachment to the community" to entitle them to be clothed with the power, the responsibility and the trust of suffrage.

The citizen who might not be included in its terms were excluded not on account of race or color, but because they were considered to have no such fixed and abiding interest in the State as to entitle them to claim suffrage as a right.

A large majority of the male citizens of the State, of voting age, were, as it was believed, embraced in the foregoing three clauses; but there remained quite a large number who were neither soldiers nor sons of soldiers, nor owners of property worth two hundred and fifty dollars.

These embraced a considerable number of men owning very little or no property, some of them men of more or less education, others of them uneducated, but intelligent, good and worthy citizens, and justly entitled to be clothed with the right of suffrage.

These also included the large number of ignorant and vicious men of both races; but, as the census of illiteracy and the statistics of crime show, belonging most largely to the colored population. Among these were the very numerous and ignorant class known as "cornfield negroes," and also the troublesome and vicious class of negroes, some in the country, but more largely frequenting the towns, who, while ignorant or unmindful of the duties of good citizenship, often had some smattering of education.

The dense ignorance or the mischievous traits and propensities of these men rendered it dangerous to the peace and well

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being of society to place in their hands a power which they were incompetent to use, except to the great detriment of the State and to their own serious injury.

The Constitutional Convention, therefore, adopted the qualifications expressed in the fourth subdivision of section 19, as a method of excluding as far as practicable these citizens of the State, who were utterly unfit for the exercise of this most important duty of freemen.

This clause admits to suffrage:

> (4). A person able to read, or, whether he can read or not, to understand and give a reasonable explanation of any section of the Constitution submitted to him by the officers of registration.

This is an intelligence qualification, designed to exclude from the electorate citizens who were unfit to be enrolled as voters, It applies alike, and without any discrimination, to whites and blacks.

If it debars negroes from the right to vote, it does this, not on account of their race or color, but on account of their ignorance of the ordinary duties of citizenship under the government under which they live.

If it shuts out from suffrage more of the negroes than it does of the whites, as is undoubtedly its purpose and effect, it does this because there are many more ignorant negroes and many more negroes who have no conception or comprehension of the government and institutions and of the simplest and plainest provisions of the organic law of the State than there are white men who are profoundly ignorant and incompetent.

Nor is this remarkable. On the contrary, it would be passing strange if the men of that virile Caucasian stock, who wrested Virginia from the wilderness and the savage and founded a civilization there which has radiated its influence to the farthest bounds of the republic, who are sprung from and have enjoyed the inherited benefit of the experience and training of the most masterful of all the races of mankind, come down to them through the vicissitudes, the trials and the triumphs of a thous-

and years, did not possess more of intelligence and more of governmental capacity and comprehension of the duties and the laws of citizenship than the mass of the less fortunate and less richly endowed negro race—"a child race"—which, as a rule, has had less training and less preparation for citizenship than had the ancestors of their white fellow citizens ten centuries ago.

Whatever else may be said of this "understanding" clause—and there has been much of gratuitous invective wasted in its unjust denunciation—it is beyond any question absolutely free from any repugnance to the fifteenth amendment to our Federal Constitution. Nor is there any other inhibition of that Constitution which it contravenes.

But the question here discussed is no longer an open question in this country. This identical question arose and was settled by the unanimous decision of this court in *Williams* v. *Mississippi*, 170 U. S., 213.

The clause in the Virginia Constitution, now being considered, is, in the particulars in which the appellants have attempted to impeach it, the same, in meaning and effect, as the clause of the Mississippi Constitution, which was reviewed and sanctioned by this court in *Williams* v. *Mississippi*—the only difference material to the present discussion being one favorable to the Virginia clause, namely, that it is made to operate for less than eighteen months, while that of Mississippi was prescribed as a permanent qualification for suffrage.

The Convention evidently had the Mississippi suffrage clause and the discussion of this court in *Williams* v. *Mississippi* in view when it adopted this provision substantially in the language of the Mississippi Constitution.

The Mississippi clause is as follows:

> "Sec. 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of the State; or he shall be able to understand the same when read to him, or give a reasonable interpretation there-

of. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

This "understanding" clause was unanimously adjudged by this court not to be in conflict with the fifteenth amendment.

The reasoning and the decision of this court in that case conclusively disposes of the main question attempted to be raised in this cause, and establishes the validity of the Virginia suffrage article.

In that case the plaintiff attacked the validity of the Mississippi "understanding" clause upon substantially the same grounds urged by the appellants in this case, and this court said that the Constitution and the statutes of Mississippi "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

It would be impossible to conceive of a statute for the registration of voters under which evil administration would not be possible. Not only is this true, but it cannot be denied that there are very few, if any, States of our American Union the administration of whose registration and election laws has not been in many, though generally exceptional, instances characterized by partiality, favoritism, illegality, and sometimes by corruption, fraud and crime.

This happens not because of any vice in the constitutions or statutes of these States, but because of the imperfection and weakness of human nature and the willingness of some registration and election officers, dominated by bitter political partisanship or by some sordid or venal consideration, to resort to lawless, corrupt or criminal methods in order to control and carry elections in the interest of faction, of party or of "the ring."

The vice is not in the laws, but in their administration. The laws are valid and constitutional, but their administration is, in such cases, illegal.

In the leading case of *Yick Wo* v. *Hopkins*, 118 U. S., 356, Mr. Justice Mathews, in delivering the opinion of this court,

carries the doctrine of the effect of the mal-administration of an otherwise valid law to the utmost limit; but he defines the proposition he formulates as a "principle of interpretation."

He says (at page 373):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This great jurist had already, in enunciating the decision of this court in that case, demonstrated and held that the ordinances of the city and county of San Francisco, impeached in that cause, were, upon their face, in conflict with the fourteenth amendment, because their manifest and necessary effect was to deprive Yick Wo and other persons in like position with him of their inalienable right to make a livelihood by the conduct of a lawful, honest, harmless and useful business and trade; that these ordinances were shown by admitted facts to be plainly and illegally discriminating in their operations; and that the mode by which they deprived these Chinese laundrymen of their rights, guaranteed to them by the Federal Constitution and the law of the land, was none the less invalid, for the reason that it was accomplished through the agency of the supervisors of said city and county, because these officials accomplished the purpose of the ordinance, not by the discharge of any definite duty or the exercise of any legitimate and reviewable discretion, but in the unrestrained exercise of arbitrary power.

In describing the power of these supervisors, Mr. Justice Mathews says (at page 366):

> "The power given to them is not confided to their discretion, in the legal sense of that term, but is granted to their mere will. It is merely

> arbitrary, and acknowledges neither guidance nor restraint."

The facts developed as to the actual administration of the ordinances are referred to, in confirmation of the determination of the court as to the meaning and effect of the text of the ordinances, and the language cited above is used in the definition of the rule as to the propriety of interpreting laws in the light of their practical operation; but we do not understand the learned judge to hold, or this court ever to have decided, that a valid and constitutional law will be rendered unconstitutional and void by a vicious, lawless or unconstitutional administration of such law.

A fair and reasonable construction of the language of Mr. Justice Mathews, quoted above, is that if a law, fair and valid on its face, "be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust discriminations between persons in similar circumstances, material to their rights, the denial of equal justice" (by such evil administration of the law) "is still within the prohibition of the Constitution,."

We are unwilling to believe that this court will ever take the illogical and fallacious position that any valid and constitutional enactment can ever be made unconstitutional and void by the unlawful, partial and unconstitutional administration of such law. If so, there can hardly a law be pointed out, either Federal or State, which would not go down before such a rule; for there is no law, capable of being mal-administered, which will not ordinarily be mal-administered sometimes, and we know that the most salutary statutes are often so abused by those charged with the duty of their execution.

But, again, the case presented by the Virginia intelligence qualification for suffrage, whenever it shall be properly and fairly brought under review in this court, will be found not to be included in the rule laid down by Mr. Justice Mathews, whatever the construction of that rule may be; for this court, in *Williams* v. *Mississippi,* 170 U S. (at page 223), expressly

held as to an "understanding" clause identical, as to the principle involved, with that of Virginia:

> "We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins, Sheriff*, 118 U. S., 356."

It is further to be remarked that this clause of the Virginia Constitution is to be distinguished from the San Francisco anti-Chinese ordinances in this, that the Virginia enactment did not vest any arbitrary power in the officers who were to execute it, but clothed them with discretionary power, to be exercised fairly, justly and impartially; devolved upon these registration officers a duty, coupled with this discretion, in the discharge of which duty their action could be reviewed and controlled by the courts; gives to any citizen whose rights are denied or abridged by any act of the officers of registration a simple, an inexpensive and a summary remedy for the prompt redress of such wrong; and that the Virginia statute holds these registration officers to a strict accountability for any wilful infraction of duty, by denouncing and punishing any such misconduct as a crime.

Section 19 of the Constitution provides:

> "Any person denied registration under this section shall have the right of appeal to the circuit court of his county, or the corporation court of his city, or the judge thereof in vacation."

And section 7 of the registration ordinance is as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county or to the corporation court of the city in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register deter-

mined, containing a statement of the facts proved before said board; to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

And section 3854 of the Code of Virginia punishes any fraudulent or wilful registration or refusal to register a qualified voter, in the following terms:

"Sec. 3854. *Wilfully Rejecting or Corruptly Registering a Voter; How Punished.*—If any registrar wilfully or maliciously reject from registration, or corruptly register any person, contrary to law, he shall be fined not less than fifty nor more than one hundred dollars, and be confined in jail not less than three nor more than twelve months."

In conclusion, we may be permitted to say that the argument for the appellants is founded upon the fallacy that the right to vote is a natural, a primary and an absolute right. It is unnecessary in this court to refute such a proposition, for it is, and has been too often, settled that suffrage is a relative, and a purely statutory right, which is the possession of only those

upon whom organized society, or the State, may see proper to confer it. If this were not true, all of the members of the body politic, of whatever age, or sex, or mental status, would be entitled to an equal voice in the government. Under the fundamental law of this representative republic, the State has the right to deny this power to any of its citizens whom it considers that it would be unsafe or unwise to entrust with its exercise; and the only limitation upon this right is that it shall not be used so as to exclude from suffrage any citizen merely on account of his race, or his color, or his previous condition of servitude.

The immediate and the remote consequences involved in the decision of the issues here outlined, whenever they are presented in a cause in which they can be properly adjudicated, are so momentous that they challenge the most earnest consideration of the jurist and the patriot.

It is true that they involve the question of suffrage, so far as the right to its exercise is based upon intelligence, the possession of property, or upon military service in time of war. In this way it affects the descendants of the African and of the Caucasian races without any unconstitutional discrimination; for the State has, in making any distinction, seized upon characteristics which are, in a large degree, possessed by both races. But its adjudication will not only in this way affect the subject of Caucasian suffrage and African suffrage in the states of the American Union, but it will affect the question also of Mongolian and Malayan suffrage in this land, which is looming up into portentous importance upon the horizon of the future.

In its determination this court will be asked to pronounce the suffrage article, deliberately framed by the deputies of the Virginia people, to be unconstitutional and void, and thereby to bring about a condition of chaos in that Commonwealth, with results the disastrous effects of which it would be difficult to exaggerate.

We know that this court should not, and will not, hesitate to decide any question of which it has adequate jurisdiction,

according to the right—even one involving such consequences—where the unconstitutionality of a law has been clearly established. But we most earnestly submit that it will not do this in any case of doubt; that, even if it was not manifest, as we believe it to be here, that there is no discrimination in this suffrage article on account of race, or color, or previous condition of servitude, this court would pause before it would hold such an act of a State to be unconstitutional.

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Chief Justice Waite, in Sinking Fund Cases, 99 U. S., 718.
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> "The courts should not declare a statute unconstitutional unless its constitutionality is clear beyond any reasonable doubt." Allen, J., in *People* v. *Allentson*, 55 N Y., 54.

Such is the established rule which governs in the construction of an ordinary statute enacted by the legislature of a State.

How much more strongly do the principles upon which it is founded apply to the solemn and deliberate enactment of any provision of their organic law, by the delegates of a people in convention assembled?

Such an enactment must stand, "unless its unconstitutionality is clear beyond any reasonable doubt."

Still less will the courts adjudge the enactment to be invalid where, as is the case here, it is manifestly not in contravention of the Federal Constitution.

It is impossible to calmly and dispassionately consider the questions here discussed without being forced to the conclusion

that they are questions of a political character, affecting not only governmental action, but the fundamental political rights of the people of the state, and their relations to their governments, state and national, in such a manner and to such a degree that any adequate relief is entirely outside of the province of the courts; and that the remedy is any such case, if a wrong has been perpetrated, can only be afforded and administered by the political department of the government, or by the people themselves in their organized political capacity.

Such matters are clearly within the domain of political and legislative action, where, however injurious the consequences of the measure adopted may be, certain political, and probable social chaos and confusion and disaster can alone be remedied or mitigated.

It is right, therefore, that the courts should not take jurisdiction of this case, or of any other case involving the political rights, the existence of the organized government and the governmental functions of the people of a State within the sphere of State action and jurisdiction.

Respectfully submitted,

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